90-119

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

CITIZENS FOR FAIR UTILITY REGULATION,
Petitioner

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, *Respondents*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

Petitions to intervene in licensing proceedings for nuclear power plants are timely if filed within thirty days of the date on which notice of such proceedings is published in the Federal Register. Petitions filed after that period are untimely and will not be granted unless a balancing of five factors set out in the regulations favors late intervention.

I. When a late filed petition to intervene seeks to address the issue of good cause for late filing by reference to the highly irregular circumstances surrounding the withdrawal of the only intervenor, is the Commission free under 10 C.F.R. § 2.714 (1990) to ignore such circumstances in its determination of the good cause question?

II. Is the refusal of the Commission to consider the illicit qualities of the settlement agreement that resulted in the withdrawal of the only intervenor an impermissible burden on the rights of petitioner, who in every way has standing to participate in licensing proceedings, to due process of law under the fifth amendment and to the right to a hearing guaranteed in the Atomic Energy Act of 1954?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Citizens for Fair Utility Regulation and the respondents United States Nuclear Regulatory Commission and the United States. Intervenors below were Joseph Macktal and Texas Utilities Electric Company.

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CITIZENS FOR FAIR UTILITY REGULATION,
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v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, *Respondents*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioner Citizens for Fair Utility Regulation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on April 12, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 898 F.2d 51 (5th Cir. 1990), and is reprinted in the appendix hereto, p. A-1, *infra*.

The opinion of the United States Nuclear Regulatory Commission is reported at 28 N.R.C. 605 (1988), and is reprinted in the appendix hereto, p. B-1, *infra*.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254 (Supp. 1990). The judgment to be reviewed was entered April 12, 1990.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THE CASE

The constitutional provisions, statutes, and regulations involved in this case, in pertinent part, are as follows.

The fifth amendment to the United States Constitution provides: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

Section 189 of the Atomic Energy Act of 1954, 42 U.S.C. § 2239(a) (Supp. 1990) states: "In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding."

Section 2.714 of Title 10, Code of Federal Regulations, titled "Intervention," states: "Any person whose interest may be affected by a proceeding and who desires to participate as a party shall file a written petition for leave to intervene. In a proceeding noticed pursuant to § 2.105 [this was such a proceeding], any person whose interest may be affected may also request a hearing. The petition and/or request shall be filed not later than the time specified in the notice of hearing. . . . Nontimely filings will not be entertained absent a determination by the Com-

mission . . . that the petition and/or request should be granted based upon a balancing of the following factors in addition to those set out in paragraph (d) of this section: (i) Good cause, if any, for failure to file on time. (ii) The availability of other means whereby the petitioner's interest will be protected. (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record. (iv) The extent to which the petitioner's interest will be represented by existing parties. (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding."

STATEMENT OF THE CASE

On July 13, 1988, contested adjudicatory licensing proceedings for the Comanche Peak Nuclear Power Plant were dismissed following a settlement agreement between intervenor Citizens Association for Sound Energy (hereinafter referred to as CASE) and TU Electric. The atomic safety and licensing board which had been conducting hearings was dissolved. That same date Citizens for Fair Utility Regulation (hereinafter referred to as CFUR) submitted to the Board a request for a hearing and petition to intervene. The presiding officer advised CFUR to withdraw that petition without prejudice to a later filing, which CFUR did. Tr. 25202.

On August 11, 1988, CFUR filed with the Nuclear Regulatory Commission (hereinafter referred to as the Commission) a petition to intervene and request for a hearing; CFUR filed a first supplement on September 12, 1988, and a second supplement on December 16, 1988. On December 21, 1988, the Commission denied CFUR's

request to intervene, finding that CFUR did not meet the regulatory standards for late intervention. On April 12, 1990, the court of appeals upheld the Commission's denial of CFUR's request to intervene.

The Commission issued TU Electric an operating license on February 9, 1990. CFUR's applications for stays of the Commission's issuance of the license were denied by the Commission and the court of appeals. CFUR's application for a stay of that part of the license authorizing fission of the nuclear fuel for low power testing was denied by Mr. Justice White on March 30, 1990.

The significance of this case lies in the unprecedented nature of the settlement between the only intervenor then a party–CASE–and the applicant for the operating license. The settlement resolved no safety issues. Rather, the applicant for the license paid $10 million to CASE and to individuals with pending Department of Labor and state court complaints of retaliation, allowed a CASE member to sit on a review committee at the plant, and agreed to pay for a consultant for CASE to employ to assist it in monitoring the construction and operation of the plant. In return the applicant received a license to operate a nuclear power plant – the natural and anticipated consequence of having the only adverse party withdraw from the proceedings. The atomic safety and licensing board declared the proceedings closed and dissolved itself, eliminating all future hearings that had been scheduled.

The agreement between CASE, the individuals with pending claims, and TU Electric, reveals its meretricious nature when the relationship among the attorneys

for the individuals and the attorneys for CASE is examined. They were the same. The three lawyers representing the individuals with retaliation claims had contingent fee contracts with their clients. Two of those lawyers also represented CASE, and the third, and his wife, were on the CASE board of directors.

TU Electric offered to settle the individual cases only if CASE would withdraw from the proceedings, relinquish its status as a party intervenor, and agree not to oppose TU Electric in any NRC forum. CASE would retain the privilege of filing a petition with the Commission under 10 C.F.R. § 2.206, a right enjoyed by "any person," regardless of standing or interest. An adverse ruling on a 2.206 petition is not reviewable.

The Commission's express refusal to recognize or consider this issue in its review of CFUR's petition to intervene, when it was fully addressed in CFUR's petition, is the basis of CFUR's Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The Nuclear Regulatory Commission is a major government agency with wide-ranging responsibilities in the areas of national energy policy and public health and safety. It is charged with protecting the public from the perils that arise from the use of a fuel that is very dangerous and that produces waste that is very dangerous, especially to people who reside near nuclear power plants. CFUR is composed of and represents such people.

The Atomic Energy Act of 1954 explicitly creates the right of persons such as CFUR and its members to a

hearing and to status as parties in proceedings in which they have an interest: ". . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." 42 U.S.C. § 2239(a) (Supp. 1990). Of course it is well-established that an agency with such a charge does not violate either the due process clause of the fifth amendment nor the act of congress that creates a right in citizens to be heard merely by creating and applying regulations designed to promote the orderly conduct of agency business. *Simmons v. Arkansas Power & Light Co.*, 655 F.2d 131 (5th Cir. 1981).

Such regulations are common, and many agencies other than the Nuclear Regulatory Commission have regulations that govern intervention in proceedings before the agency. Some agencies and the equivalent regulations to 10 C.F.R. § 2.714 (1990) are the Department of Transportation, 14 C.F.R. § 302.15 (1990); Federal Energy Regulatory Commission, 18 C.F.R. § 385.214 (1990); Federal Communications Commission, 47 C.F.R. § 1.223 (1989); and the Interstate Commerce Commission, 49 C.F.R. § 1112.4 (1989). The role of the private intervenor has become an established institutional feature of administrative jurisprudence, and the error of the Commission and the court of appeals in this case, if allowed to stand, will become widely known precedent to the harm of every regulatory scheme referred to above.

The settlement between CASE and TU Electric did not resolve any safety issues whatsoever, it offends even the most rudimentary understanding of conflicts of inter-

est, and it has allowed a fundamental flaw, as that term is used in Commission precedent and case law, to persist up to this time, with deleterious consequences for the integrity of the fact-finding process in the NRC and a myriad of other agencies with similar regulations. The settlement also created an unmistakable increase in the likelihood that the Comanche Peak Nuclear Power Plant will malfunction and physically harm CFUR members.

In 1979, three citizen groups were granted intervenor status in the licensing proceedings connected with the Comanche Peak plant. CFUR and another organization withdrew as parties in 1982, leaving CASE as the only party adverse to the utility company. CASE, over the next several years, by its vigorous participation in adversarial proceedings before an atomic safety and licensing board, brought to light major design defects and construction problems at the plant. This was possible because the regulations provide for adversarial hearings. 10 C.F.R. Part 2. Discovery, subpoena power, cross-examination under oath, and the right to produce evidence in a forum of record, are particularly useful in discovering falsehoods and exposing coverups. The law has long known these to be superior tools for testing opinion and for building a record of facts that is more reliable than that likely to be produced by an unopposed party with much to gain from a favorable outcome of the proceedings. "If the Commission is properly to discharge its duty in this regard, the record on which it bases its determination must be complete." *Scenic Hudson Preservation Conference v. F.P.C.*, 354 F.2d 608, 612 (2d Cir. 1965).

In this case TU Electric admitted at the July 13, 1988 hearing that CASE's use of the adversarial system had materially improved the safety of the plant, and that many very significant flaws would not have come to light if only the applicant for the license and the NRC staff participated in deciding what information was relevant and what not. Tr. 25293. For example, it was through discovery that CASE brought to light trending documents possessed by the NRC staff, and it was the adversarial proceeding that allowed an intervenor to discover these important documents and use them to reveal an overall pattern of quality control breakdown that was not being promptly identified or corrected.

This was also how the Board learned of the defective design of installed pipe supports which became a major safety issue in the proceedings. But for the adversarial process, the defective and dangerous pipe support threat would not have been discovered. The presiding officer said the applicant would not have admitted to it, and the NRC staff did not find it. Board Memorandum & Order, LBP-83-81, December 28, 1983.

Throughout the licensing process of the Comanche Peak nuclear power plant, TU Electric has gone on record assuring the NRC staff that it was a well-built and well-designed plant, and that the plant met the quality assurance and quality control requirements of 10 C.F.R. Part 50, appendix B. Until July 13, 1988, that assurance never stood up under the careful scrutiny and challenges of the adversarial process.

In December 1983, when TU Electric and the NRC staff were ready to certify the plant for licensing, the

Appendix B
Opinion of the United States Nuclear Regulatory Commission – December 21, 1988

Board ordered TU to correct outstanding design deficiencies and prove to the Board that the plant was constructed according to the requirements of the regulations. By 1985, TU still had not provided such proof, and, instead, requested suspension of the licensing hearings.[1] The request was granted. In April 1988, CASE filed with the Board its statement of preparedness and intent to litigate eighteen outstanding safety issues. On June 1, 1988, in a prehearing conference, CASE agreed that it would be able to accept TU's redesign plan for the pipe supports (one of the eighteen issues raised in April), but stated that it had reached no agreement on the implementation of the redesign plan for the pipe supports, nor on any of the other safety issues. Tr. 25163-80.

On June 30, 1988, CASE, the sole remaining intervenor, negotiated away its only right under the Atomic Energy Act, the right to a hearing, for a "program" for resolving the issues of safety and a commitment by TU that it would correct all of the deficiencies in design and construction prior to licensing. Tr. 25248, 25251, 25280. CASE received $4.5 million for giving up this statutory right and its witnesses received $5.5 million to settle their labor claims against TU and its prime contractor, Brown and Root. The attorneys for the witnesses, of course, received a substantial contingent fee subsequent to their other client, CASE, surrendering its rights to a hearing.

[1] In fact, CFUR believes TU was simply unable to provide the required proof, then and now, and such inability fueled its efforts to settle with CASE.

Because of the settlement, the hearings were never resumed and, except for the pipe support redesign plans, none of the issues referred to by CASE or the Board were resolved prior to the settlement.

Attorneys for CASE and TU Electric admitted at the settlement hearing of July 13, 1988, and CASE has continuously acknowledged since the settlement,[3] that the substantive safety issues (those that CASE was previously prepared in April to litigate to completion) were *not* resolved by the settlement. Tr. 25248-50.[4] This kind of settlement – monetary and quasi-private in nature, and not resolving the substantive issues critical to the public interest – is neither contemplated by the regulatory scheme nor the Commission standards governing licensing proceedings.

While it is true that Commission and NRC regulation encourage the settlement of issues in controversy, Commission standards require such settlements to be "fair, consistent with NRC regulations and in the public interest." *Rockwell International Corporation (Rocketdyne Division)*, ALAB-925, 30 N.R.C. 709, 721 (1989). In that case the atomic safety and licensing appeal board noted that ". . . NRC proceedings are not merely contests between private litigants, but rather are intended to

[3] On the eve of licensing on February 6, 1990, CASE filed a 2.206 petition to delay the licensing of the plant, stating that it had "no confidence that [TU Electric's] promises would provide reasonable assurance that public health and safety will be protected." The petition was denied.

[4] George Edgar, attorney for TU Electric, said: "We have not reached agreement on the merits. We have reached agreement on a process for resolution of issues." Tr. 25248. Tony Roisman, attorney for CASE, said: "This is not an agreement . . . to resolve any substantive issue. Every issue that CASE believed was of concern a month ago, it still believes is a concern today." Tr. 25250.

a compelling showing as to the remaining four factors. Although two of the factors did weigh in CFUR's favor, these two factors are to be accorded less weight. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241 (1986).

III. CONCLUSION

The action of the NRC in denying the late-filed petition for intervention is not arbitrary, capricious, or contrary to existing law. Having failed to demonstrate good cause for the late filing, CFUR was obligated to make a compelling showing as to the remaining factors. The NRC did not commit reversible error in concluding that such a showing had not been made. Consequently, we affirm.

AFFIRMED

resolve matters in controversy in a manner that will protect the health and safety of the public generally." *Id.* In *Rockwell* the appeal board was chastising the same judge who presided over the Comanche Peak proceedings which resulted in the settlement, because he had suggested to the intervenors and Rockwell that he ". . . was available to facilitate a settlement and that 'these negotiations could be private and confidential' as a way of discussing, among other things, 'what information should be made available to the public.'" *Id.*

This settlement is unprecedented in NRC proceedings. Commission standards contemplate negotiations to "resolve contentions, settle procedural disputes, and better define issues." *Statement of Policy on Conduct of Licensing Proceedings*, 13 N.R.C. 452 (1981). The standards do not address settlements for monetary compensation in exchange for withdrawal of contentions and closing proceedings on public safety issues.

Private parties intervening in licensing proceedings represent the public interest as well as their own. In light of the important institutional role private intervenors fulfill in administrative proceedings, particularly those licensing a nuclear power plant, settlements that remove intervenors and leave only an applicant for a license as a party must be subject to close scrutiny to assure the public interest is represented. At the very least, the circumstances surrounding the withdrawal of intervenors should be taken into account and evaluated when another party's motion to intervene follows upon the withdrawal of an intervenor. In *WTL Broadcasting Co. v. F.C.C.*, 376 F.2d 782 (D.C. Cir. 1967), four parties applied for construction permits for radio stations in

Florida; three of the applicants withdrew or were dismissed, leaving only one applicant in the proceeding. Another party attempted to intervene, and intervention was denied by the Commission. On petition for review, the court of appeals reversed and remanded the case to the Commission so that it could exercise its discretion in light of the benefit to the public of a "private opposition to the applicant to assert the public interest factors as an adversary sees them. . . ." *Id.* at 785.

In *Metropolitan Edison Company* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 N.R.C. 327 (1983), the Commission said regarding a late filed intervention petition that ". . . recent events may be a key factor in establishing 'good cause' for late intervention." *Id.* at 331. The Commission stated: "It is important to note that the other four factors to be considered and weighed in late intervention are predicated on the petitioner having a cognizable interest in the proceeding which would justify participation by a late intervenor." *Id.*

In the July 13, 1988 proceedings which dismissed the Comanche Peak licensing hearings, the presiding judge, in noting that CFUR had just learned of the stipulation and agreement between CASE and TU Electric, said: ". . . the fact that you have just learned of this stipulation may help to form good cause for late filing." Tr. 25198. Thus even the presiding judge who dismissed the proceedings expressly recognized that the settlement may constitute a "recent event" justifying late intervention. The Commission's failure to examine seriously the nature and timing of the private settlement agreement ending public licensing proceedings in CFUR's petition

to intervene is a significant issue with profound implications in nuclear licensing proceedings: whether those proceedings are mere forums for resolving private disputes or whether their purpose is to assure full airing and resolution of issues critical to public safety and well-being.

The Commission has recently reaffirmed the statutory right to a hearing on issues material to licensing by reopening hearings to consider evidence of a fundamental flaw in an emergency preparedness plan. *Long Island Lighting Company* (Shoreham Nuclear Power Station, Unit 1), ALAB-903, 28 N.R.C. 499 (1988). In *Shoreham*, the emergency preparedness plan had been litigated and licensing hearings closed. After the hearings closed, the utility conducted emergency preparedness exercises to test the plan. When the exercises revealed, according to intervenors, a fundamental flaw in the plan, the Commission initiated hearings to litigate that issue, relying on *Union of Concerned Scientists v. N.R.C.*, 735 F.2d 1437 (D.C. Cir. 1984). The *Shoreham* opinion and *Union of Concerned Scientists* establish that the statutory right to a hearing continues even after a licensing proceeding has ended, where an issue material to licensing, that is, which would be potentially harmful to the health and safety of the public, is raised. A fundamental flaw demonstrated to exist after licensing has occurred is such an issue. Further, the fundamental flaw standard enunciated in the emergency preparedness context is also applicable to issues of quality assurance in low power testing, especially when a particular event "is indicative of pervasive problems." *See Public Service Company of*

New Hampshire (Seabrook Station, Units 1 & 2), LBP-89-28, 30 N.R.C. 271, 279 (1989).

Borg-Warner check valves in the auxiliary feedwater system failed at Comanche Peak in 1985, twice in 1989 and in April and May of 1990 after licensing. This history reveals a fundamental flaw in TU Electric's plan and its assurances to the Commission that all components relating to safety would perform their design functions prior to licensing. These failures did not come to light until May 1989, when, during a hot functional test which the NRC was relying on to determine whether the plant was ready for licensing, the valves failed. The Commission discovered the valves had failed twice in 1989 and earlier in 1985. The utility had failed to report these malfunctions to the NRC in violation of 10 C.F.R. Part 50. These valves are crucial safety related components needed to mitigate the consequences of an accident and to prevent the escape of radiation into the environment.

TU Electric assured the Commission, and the NRC staff assured CFUR, that the check valves would function as designed before licensing. Yet, after licensing, during a power ascension, the same valves malfunctioned again. TU Electric now states that it may need to replace the valves outright. Thus, the commitments made by TU prior to licensing and the corrective solutions accepted by the NRC staff have not worked, and may never work, with the result that the reasonable assurance requirement of 10 C.F.R. Part 50 that components related to safety would perform their design functions, has not been met.

The record to date shows that Comanche Peak is still suffering from pervasive problems in its quality assurance and quality control plan and that fundamental flaws exist in the plans submitted by the utility to the Commission that the Commission relied on to justify a license. Had the hearings been in progress, the issue of the check valves would have been caught and corrected or no license would have issued. Only a reopening of the licensing proceedings, reestablishing an atomic safety and licensing board and allowing intervention, can now determine the extent and depth of the pervasive problems of quality assurance and quality control and the fundamental flaws of TU's corrective action plans. The failure of the Borg-Warner check valves clearly constitutes a fundamental flaw which was not corrected as a consequence of the premature cessation of the adversarial process.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A
Opinion of the United States Court of Appeals for the Fifth Circuit – April 12, 1990

CITIZENS FOR FAIR UTILITY REGULATION, Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and the United States of America, Respondents.

Nos. 89-4124, 89-4310.

United States Court of Appeals,
Fifth Circuit.

April 12, 1990.

Petition for Review of Orders of The Nuclear Regulatory Commission.

Before WISDOM, POLITZ and JOHNSON, Circuit Judges.

JOHNSON, Circuit Judge:

In early February 1990, this Court denied a motion to stay proceedings filed by Citizens For Fair Utility Regulation (CFUR). CFUR's motion requested that the issuance of an operating license for the Comanche Peak Nuclear Power Plant be stayed pending this Court's decision on the merits. Our denial was predicated on a determination that CFUR had failed to demonstrate a substantial likelihood of success on the merits of its claim that the Nuclear Regulatory Commission (NRC) erroneously denied CFUR's late-filed motion to intervene in the licensing proceedings. Texas Utilities Electric Co., et al. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 607 (1988) (hereinafter CLI-

88-12); 10 C.F.R. §§ 2.714(a)(1)(i-v). We turn now, in this opinion, to address the merits of CFUR's claim.

I. FACTS AND PROCEDURAL HISTORY

CFUR is a Tarrant County based public interest organization "representing a broad base of citizens whose primary concerns are safe, affordable and environmentally sound energy. Since its founding in 1976, CFUR has been dedicated to environmental and energy education." Petitioner's Brief at 5-6. In 1979, CFUR was granted intervenor status in Comanche Peak's licensing proceeding. At the same time, Citizens Association for Sound Energy (CASE) and Association of Communities for Reform Now (ACORN) were also granted intervenor status.[1] ACORN later withdrew from the proceedings in 1981. CFUR withdrew from the proceedings on April 2, 1982. The proceedings continued with CASE as the sole intervenor.

By 1984, the proceeding had resolved all contentions with the exception of one relating to Quality Control / Quality Assurance (QC/QA) in the construction of the plant. On June 28, 1988, CASE and TU Electric reached a settlement agreement terminating the existing pro-

[1]The NRC provides a two-stage agency process for consideration of those aspects of licensing a nuclear power plant related to protecting public health, safety and the environment. 42 U.S.C. § 2011 *et seq.*; 42 U.S.C. § 4321 *et seq.* On February 28, 1978, Texas Utilities Electric Company (TU Electric), the owner of the Comanche Peak station, filed an application for a license to operate Comanche Peak. The Atomic Energy Act requires a hearing on a construction permit application but permits the NRC to issue an operating license in the absence of an adjudicatory hearing if one is not requested. An adjudicatory proceeding commences when the NRC publishes notice of proposed action in the Federal Register. The notice includes a time period during which interested persons may file a request for a hearing or file a petition for leave to intervene. 10 C.F.R. §§ 2.105(d); 2.714(a)(1). CFUR, CASE, and ACORN filed timely petitions to intervene.

ceedings.[2] Consequentialy, CASE, TU Electric, and the NRC staff submitted a joint motion to dismiss the proceedings as settled. On July 13, 1988, the Licensing Board held a public meeting. After receiving comments from the parties and interested members of the public, the Board issued an order dismissing the proceedings.

On August 11, 1988, CFUR filed a late petition before the Atomic Safety and Licensing Board seeking to intervene in the Comanche Peak proceedings. At the time of this filing, CFUR's petition was filed nine years out-of-time, six years after CFUR's voluntary withdrawal, and a month after the hearings had been dismissed. CFUR filed two supplements to its initial petition. In the first, CFUR alleged that Joseph J. Macktal, intervenor in the instant case, had expresed safety concerns but was prevented from raising them because of an illegal agreement between the Comanche Peak contractor, Brown & Root, and CASE attorneys.[3] In the second supplement, CFUR alleged that TU Electric had used certain materials in the construction of the station in violation of both the

[2] CFUR's brief points out that this settlement marks the first time an intervenor (CASE) in a nuclear power plant licensing proceeding has received financial remuneration in the context of a settlement agreement.

[3] On December 16, 1989, Macktal filed a Petition to Intervene in the CFUR proceeding on a limited issue concerning the nature of the settlement agreement. We note here that this issue has become moot. The NRC has withdrawn any comment on the legality of Macktal's settlement agreement and indicated that its decision to deny CFUR's petition was independent of the validity of that agreement. Memorandum and Order CLI-88-06. Subsequent to the issuance of CLI-88-06, the Secretary of Labor ruled on the validity of the disputed provision, found it void against public policy, and severed that provision. Macktal v. Brown & Root, Inc., Docket No. 86-ERA-2332, Order Rejecting in Part and Approving in Part Settlement Between the Parties and Dismissing Case at 10-11 (Nov. 11, 1989). Consequently, Macktal's claim that he may be prejudiced by the NRC's interpretation of this agreement is moot.

manufacturer's directions and the approved design of Comanche Peak.

On December 21, 1988, the NRC, concluding that CFUR's petition failed to satisfy the five-factor test governing late-filed petitions for intervention, denied the petition to intervene. Texas Utilities Electric Company, CLI-88-12; 10 C.F.R. § 2.7 4(a)(i-v).

The NRC may exercise its discretion to grant a late-filed petition if it finds that a favorable showing has been made on the following five factors:

> 1. good cause for failure to file on time;
>
> 2. the availability of other means whereby the petitioner's interest will be protected;
>
> 3. the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record;
>
> 4. the extent to which the petitioner's interest will be represented by existing parties; and
>
> 5. the extent to which the petitioner's participation will broaden the issues or delay the proceeding.

The burden is on the petitioner to demonstrate that a balancing of these factors weighs in favor of granting the untimely petition. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327 (1985). If the petitioner fails to show good cause for failure to file on time, then the petitioner is bound to make a compelling showing of the remaining four factors before intervention is proper. *See, e.g.*, Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387 (1983); Nuclear Fuel Services,

Inc. (West Valley Reprocessing Plant) CLI-75-4, 1 NRC 273 (1975).

In support of its petition, CFUR alleged that it withdrew from the proceedings due to a financial inability to continue and in reliance on the assumption that CASE would continue to litigate the proceedings. CFUR further argued that it had no alternative means to protect its interest and that it could make important contributions to the record. Finally, CFUR argued that allowing it to intervene would not delay the proceedings which were dismissed prior to CFUR's petition to intervene.

The NRC concluded that CFUR had failed to demonstrate good cause for the late filing of the petition to intervene. The NRC then determined that CFUR had failed to make a compelling showing on the remaining four factors. While the NRC did find that two of the four factors (the availability of other means of protecting the petitioners' interest and the extent to which the petitioner's interest will be represented by existing parties), the NRC found that the remaining factors weighed heavily against CFUR. Accordingly, the NRC denied the petition to intervene based on CFUR's failure to make a compelling showing on the remaining factors.

CFUR now urges this Court to find that the NRC abused its discretion by finding that CFUR had failed to meet the five requirements for intervention under 10 C.F.R. § 2.714; we decline to do so.

II. DISCUSSION

[1] In reviewing agency action, this Court will defer to agency judgement unless the action is "arbitrary, capri-

cious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *See, e.g., Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983). This standard is even more deferential where, as here, a Court is reviewing an agency's application and interpretation of its own regulations. *See, e.g., Robertson v. Methow Valley Citizens Council*, ___ U.S. ___, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989).

[2] CFUR bases its argument as to the first factor, good cause, primarily on CFUR's previous participation and subjective reliance on CASE's continued participation. CFUR points out that "CASE, as a tax-exempt organization, had been more successful in fundraising, and since CFUR had not established itself as a tax exempt organization, CASE was likely to be in a better position to raise funds for a combined effort. CFUR decided to withdraw in favor of CASE." Petitioners Brief at 8. CFUR further argues that the settlement agreement between CASE and TCU Electric was unprecedented and that CFUR had no indication that such action might occur.

While this Court does not doubt the veracity of CFUR's allegation of surprise at CASE's settlement, such action on the part of CASE, in and of itself, does not create good cause for CFUR's late-filed petition to intervene. NRC precedent consistently and clearly indicates that a potential intervenor cannot rely on another intervenor to present a certain view or represent certain interests without assuming the risk that the intervenor will not do so. *See, e.g.*, Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC

760 (1977); *Easton Utilities Commission v. AEC*, 424 F.2d 847 (D.C.Cir.1970). CFUR argues that *River Bend* and *Easton* are not appropriate authority for the instant case because of the extensive prior involvement of CFUR in the proceedings. We do not agree. While CFUR did participate in the early stages of the proceedings, it withdrew in 1982, some six years before the ultimate settlement. At the time of the filing of the petition to intervene, CFUR was a legal stranger to the action.[4] As the NRC succinctly stated, "CFUR assumed the risk that CASE would not represent its interest to its complete satisfaction when it withdrew from the proceedings in 1982. It cannot now complain when that risk becomes reality." CLI-88-12 at 6.

CFUR next argues that, even in the absence of a determination of good cause, the NRC abused its discretion by failing to find that a compelling showing in support of intervention had been made as to the remaining four factors. The NRC did find in CFUR's favor on two of the four factors; however, the NRC concluded that the remaining two factors weighed heavily against CFUR. The NRC concluded that CFUR had failed to make a compelling showing, and we cannot conclude that this determination was an abuse of discretion.

[3] In analyzing the third factor, the ability to contribute to a sound record, NRC pointed to CFUR's six year absence from the proceedings and to CFUR's failure to point with specificity to any specific accomplishments

[4] CFUR also argues that the circumstances imply a "sound foundation" for replacement because of the existence of the Macktal agreement. As we noted in footnote 3, the issue involving that agreement is moot; CFUR cannot rely on such an agreement to establish good cause for its late-filed petition.

during its tenure as a participant or to any potential witnesses it intended to call at the hearings. Specificity is inherently necessary in order to allow the NRC to weigh the equities to determine if a compelling showing has been made. Without specificity, the NRC is forced to act as a mystic when determining if the potential intervenor has demonstrated a true ability to contribute to the record or is merely attempting to step in to delay the proceedings or otherwise act as a nuisance intervenor. The Appeal Board has stressed the importance of specificity as to this factor. Mississippi Power and Light Company (Grand Gult [sic] Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982).

In light of the lack of specificity provided by CFUR, the NRC concluded that this factor weighed heavily against the petitioner. This attribution of weight was not an abuse of discretion.[3]

[4] Finally, CFUR has failed to demonstrate that it would not delay the proceedings or broaden the issues. CFUR's petition was filed after the proceedings had been dismissed; CFUR has been absent from the proceedings for six years; and the petition filed by CFUR indicates that, at least in the area of QC QA, CFUR will attempt to raise additional concerns.

Based on the foregoing, we cannot say that the NRC abused its discretion in finding that CFUR failed to make

[3] Balancing this factor against CFUR is further supported by CFUR's failure to address the issues raised by the Licensing Board in earlier proceedings. Prior to this petition, CFUR filed a petition to intervene which the Licensing Board permitted to be withdrawn without prejudice. In doing so, the Board indicated several areas which CFUR should address in order to demonstrate CFUR's ability to contribute to a sound record. CFUR did not fully address these issues.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:
Lando W. Zech, Jr., Chairman
Thomas M. Roberts
Kenneth M. Carr
Kenneth C. Rogers
James R. Curtiss

In the Matter of

TEXAS UTILITIES ELECTRIC COMPANY, *ET AL.*	Docket Nos. 50-445-OL 50-446-OL
(Comanche Peak Steam Electric Station, Units 1 and 2)	Docket No. 50-445-CPA

MEMORANDUM AND ORDER

CLI-88-12

I. Introduction and Summary

On August 11, 1988, the organization Citizens for Fair Utility Regulation ("CFUR" or "Petitioners") filed a late petition before the Atomic Safety and Licensing Board seeking to intervene in the Comanche Peak Operating License ("OL") and Construction Permit Amendment ("CPA") proceedings. This filing presents a somewhat unusual situation because the Licensing Board which was conducting those proceedings dismissed both cases on July 13, 1988, approximately four weeks earlier, act-

ing on a joint motion filed by all parties pursuant to a settlement agreement. The NRC staff and the applicant, Texas Utilities Electric Company ("TUEC") filed their responses with the Commission rather than with the Licensing Board, in the apparent belief that the Commission had sole jurisdiction over the petition. The Licensing Board has not acted on CFUR's petition–not even to the extent of ruling on the threshold question of whether it has jurisdiction to entertain the petition. In light of the Licensing Board's inaction, and in order to clarify any resulting confusion regarding the status of the Comanche Peak facility, the Commission has elected to rule on the petition itself.[1] Upon review, we find that the petition fails to satisfy the five-factor test for late-filed intervention petitions set forth in 10 C.F.R. 2.714(a)(i-v). Therefore, we deny the petition to intervene.

II. CFUR's Petition

CFUR was one of three original intervenors in this proceeding, having been admitted to the proceeding on June 27, 1979. CFUR and the second intervenor withdrew from the proceeding in 1982, leaving the Citizens Association for Sound Energy ("CASE") as the only party contesting the issuance of the operating license. In this petition, CFUR alleges that it withdrew from the proceeding on the assumptions that (1) it would support

[1]Resolution of this question has been delayed by a series of questionable judgments by the parties and the Licensing Board. Initially, the petitioners filed their petition before the Licensing Board which had been hearing both Comanche Peak proceedings despite the Licensing Board's clear statement during a public proceeding the day before it dismissed the case that any such petition should be directed to the Commission. *See* Transcript at 25,202-08. Whether that advice was correct in this case is a question we need not reach in view of our decision to rule on the petition ourselves.

CASE's efforts and (2) CASE would diligently prosecute the proceeding against Comanche Peak.[2] CFUR further alleges that CASE does not intend to implement the oversight functions of the settlement agreement which allow a CASE representative: (1) to monitor construction and operation of the plant as a member of TUEC's Operations Review Committee; and (2) to report any perceived problems to the NRC as necessary. Accordingly, in CFUR's view, CASE cannot be relied upon to uphold the public's interest in a safe plant.

As a result, CFUR argues that it is now entitled to replace CASE as an intervenor in the proceeding because CASE has failed to carry out the above assumptions upon which CFUR acted, contrary to CFUR's wishes. According to the petition, if CFUR had known that CASE might withdraw from the proceeding, it would not have withdrawn. Therefore, argues CFUR, good cause exists to grant the late-filed petition to intervene.[3]

Furthermore, CFUR alleges that it has no alternative means other than intervention to protect its and the public's interests, that it can make important contributions to the record, that no other parties are available to represent CFUR's interests, and that allowing CFUR to

[2] CFUR alleges that its reliance upon CASE was "reasonable." We accept this characterization although, as we will demonstrate, it is irrelevant for our purposes.

[3] CFUR's allegations include: a breakdown of QA QC procedures at the plant; the existence of unspecified life-threatening safety flaws; perjury by the applicant's employees or agents; falsification of documents and engineering calculations by the applicant; hazardous insulation used in the plant; invalid hydrostatic testing; poor quality pipe coating; inadequate recordkeeping; and defective welds in the spent fuel pool liner.

intervene will not delay the proceedings which were dismissed by the Licensing Board on July 13, 1988.

III. Analysis

A. The Applicable Standard

In order to prevail, CFUR must satisfy a balancing of the five requirements for an "untimely" or "late-filed" petition found in 10 C.F.R. 2.714 (a)(1)(i-v).[4] Those five factors are:

> (1) the "good cause" for failure to file on time; (2) the availability of other means of protecting the petitioners' interests; (3) the extent to which the petitioners' participation may reasonably be expected to assist in developing a sound record; (4) the extent to which the petitioners' interest will be represented by existing parties; and (5) the extent to which the petitioners' participation will broaden the issues or delay the proceeding.

The burden is on the petitioner to satisfy the Commission that a balancing of these factors weighs in favor of granting the petition. *Metropolitan Edison Company* (Three Mile Island Nuclear Power Station, Unit 1), CLI-83-25, 18 NRC 327, 331 (1983).[5]

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[4]The NRC Staff concedes that CFUR satisfies the standing and interest requirements found in 10 C.F.R. 2.714. *See* NRC Staff response at 7-8. We agree. Thus, we will confine our analysis to the five-factor lateness test.

[5]In preparing this order, we have reviewed both CFUR's initial petition and its "First Supplement" together with the responses to both documents filed by both the NRC Staff and the Applicant, TUEC. We have totally disregarded the letter filed by the Nuclear Management and Resources Council ("NUMARC") dated October 7, 1988. NUMARC is not a party to this proceeding and has not sought to participate under Commission regulations. Organizations which wish to present their views on the record should properly seek leave to intervene or leave to participate as an *amicus*. *See* 10 C.F.R. 2.715 (1988).

B. Factor (i): "Good Cause" For Late Intervention

Long-standing and well-settled Commission precedent clearly holds that one party may not demonstrate "good cause" for late intervention by attempting to substitute itself for another party which has withdrawn from the proceeding. *See, e.g., Gulf States Utilities Company* (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 795-98 (1977) ("*River Bend*"). In that case, the Union of Concerned Scientists attempted to replace the State of Louisiana after the State decided to withdraw from the proceeding, arguing that the organization and its members had been "lulled into inaction" by the State's previous participation. 6 NRC at 796. The Appeal Board rejected that argument, holding that the belated petitioners assumed the risk that the previous litigant's degree of involvement would not fulfill their expectations and that "a foreseeable consequence of the materialization of that risk was that it would no longer be possible to undertake [themselves] the vindication of [their] interests." 6 NRC at 797, *quoting Duke Power Company* (Cherokee Nuclear Station, Units 1, 2, and 3), ALAB-440, 6 NRC 642, 645 (1977) ("*Cherokee*"). In essence, a potential intervenor may not rely upon an existing intervenor to present its views or represent its positions without assuming the risk that they will not do so.

Furthermore, the U.S. Court of Appeals for the District of Columbia Circuit has specifically upheld the Commission's denial of late intervention in similar circumstances. "We do not find in statute or case law any ground for accepting the premise that proceedings before administrative agencies are to be constituted as endurance contests modeled after relay races in which

the baton of proceeding is passed on successively from one legally exhausted contestant to a newly arriving legal stranger." *Easton Utilities Commission v. AEC*, 424 F.2d 847, 852 (D.C. Cir. 1970).

Clearly, this case is analogous to the *River Bend*, *Cherokee*, and *Easton* cases. In each of these cases, the intervenors attempted to claim a "right" to substitute themselves for parties who have withdrawn from the proceedings. Obviously, however, a party has no "right" to substitute itself into a proceeding. Instead, each party must demonstrate that it is entitled to intervene on its own merits. Any previous reliance–however misplaced–on another party to assert its interests does not in and of itself constitute sufficient "good cause" to justify late intervention. Like the petitioners in *River Bend* and *Cherokee*, CFUR assumed the risk that CASE would not represent its interests to its complete satisfaction when it withdrew from the proceeding in 1982. It cannot now complain when that risk becomes reality.[6] Thus, the claim that CFUR relied upon CASE to represent its interests in the hearing does not constitute "good cause" for late intervention and the first factor weights against granting the petition.

C. Analysis of Factors (ii) through (v)

We now turn our attention to the remaining four factors against which we must weigh the petition. When the intervention is extremely untimely and the proceeding has been essentially completed, as is true in this case,

[6]The fact that various members of CASE may have disagreed with the course of action taken by the majority of CASE's membership or directors does not add any support to CFUR's petition. Obviously, in any organization, there can be as many points of view as there are members.

and the petitioner utterly fails to demonstrate any "good cause" for late intervention, it must make a "compelling" case that the other four factors weigh in its favor. *See, e.g., Long Island Lighting Company* (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 397 (183) ("*Shoreham*"); *Detroit Edison Company* (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 (1982); *South Carolina Electric and Gas Company* (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 886 (1981), *aff'd sub nom. Fairfield United Action v. NRC*, 679 F.2d 261 (D.C.Cir. 1982) (Table). As we will demonstrate, we find no compelling case here.

The NRC staff concedes that factors (ii) and (iv) weigh in favor of the petitioner and we agree. Turning to the third factor, the ability to contribute to a sound record, we find that CFUR has been absent from the proceedings for six (6) years. There is no evidence that it has any knowledge of the nature of the factual background or specific issues involved in Contention 5 at issue in the OL Proceeding or Contention 2 at issue in the CPA proceeding.[7] Furthermore, and most importantly, it has identified no special expertise or experience which its members possess which would enable it to address those issues. The only factor cited is a vague reference to participation in the prior proceedings before it withdrew as a party. However, CFUR does not provide us with any

[7] Throughout both the Petition and the "First Supplement" CFUR has repeatedly ignored the CPA proceeding and has failed to address Contention 2 admitted in that proceeding. While we will treat the petition as filed in both proceedings, we note that what little substance CFUR's submittals contain refer exclusively to the OL proceeding, not the CPA proceeding. Therefore, any showing in favor of CFUR's intervention in the OL proceeding is absent in the CPA proceeding.

specific accomplishment in those hearings which would demonstrate any significant expertise.

Moreover, CFUR has not identified any witnesses it intends to call at the hearings which it proposes, much less any experts in the areas which were at issue in either the OL or CPA proceeding. Additionally, CFUR's issues appear to be simple, unspported disagreements with statements in various NRC documents such as inspection reports. *See* Petition at 14-15. The Appeal Board has repeatedly stressed the importance of providing specific and detailed information in support of factor (iii). "When a petitioner addresses this [third] criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony." *Mississippi Power & Light Company* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982); *Shoreham*, 18 NRC at 399. In the circumstances of this case, CFUR would need to be very precise and detailed regarding the issues it intends to raise and how it intends to address them. Having failed to do so, this factor weighs heavily against intervention.

Regarding factor (v), we find that there will be an inevitable delay while CFUR acquaints itself with the proceedings. Although CFUR alleges that it "is fully prepared to take the proceedings as it finds them," *see* Petition at 19, we find that promise of questionable value. CFUR's members have not been involved with the proceedings for over six (6) years. The petition indicates that CFUR apparently has no knowledge of the extensive proceedings which have occurred after 1982. For example, CFUR's primary reference to the extensive

corrective programs undertaken by TUEC at Comanche Peak such as the CPRT and the CAP is a quote from a 1987 CASE newsletter. *See* Petition, Attachment G. Additionally, CFUR makes no reference to the extensive evaluations by the NRC staff which have resulted in the various Project Status Reports and the Supplemental Safety Evaluation Reports. Obviously, evaluation of these documents (among many others) would be central to understanding the status of the plant's construction and the current posture of the licensing process. Yet the petition contains no evidence that CFUR has even commenced such a review. Therefore, we find no evidence in the petition that CFUR could immediately step into both proceedings without a substantial delay.

Furthermore, CFUR appears to be attempting to broaden the issues in dispute before the two proceedings. Contention 5 at issue in the OL proceeding alleges that TUEC employed inadequate Quality Assurance / Quality Control ("QA/QC") procedures during plant construction. Contention 2 at issue in the CPA proceeding alleges that TUEC deliberately violated NRC regulations in order to speed construction. However, CFUR raises issues which appear to go beyond those two areas. *See* Note 3, *supra*. Expansion of the hearings to cover these issues would undoubtedly delay the proceedings.

IV. CFUR's Supplemental Pleading

In its "First Supplement," CFUR alleges that TUEC and CASE have conspired to enter into "illegal settlement agreements" resolving at least one of the Department of Labor ("DOL") employment discrimination cases concerning retaliation against alleged "whistleblowers."

CFUR seeks a hearing to explore these claims. In addition to widening the scope of the proceedings, *see* factor (v), *supra*, these allegations do not constitute grounds for ordering a hearing.[5] We read the agreement referenced in the CFUR's supplemental petition to allow the individual involed to bring any safety concerns he has directly to the NRC, either on his own behalf or on the behalf of organizations not referenced in the agreement, and to respond to an administrative subpoena if that subpoena is not quashed by the issuing officer. In its response, TUEC concedes as much. *See* Applicant's Response to CFUR's Fist Supplement at 8. Moreover, at the prehearing conference discussing the settlement agreement (at which CFUR was present) counsel for both CASE and TUEC pointed out that none of those individuals involved in settlement agreements before the DOL were barred from bringing concerns to the NRC. *See* Transcript at 25,257; 25,268. The agreement referenced in the CFUR petition only restricts the individual's right to appear voluntarily as a *witness* or a *party* in certain NRC proceedings (and then only on behalf of the organizations and individuals listed in the agreement) and obligates the individual to take "reasonable" steps to resist a subpoena in such proceedings. As long as the individual's right to bring matters to the NRC in a reasonably convenient manner is not curtailed, we do not see a violation of federal law or NRC regulation.

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[5]CFUR's allegations in this regard appear directed not at CASE itself, the NRC, or even TUEC or its contractors, but at the attorneys who represented CASE before the NRC and, coincidently, the specific individual before the Department of Labor. These allegations concern actions performed in their role as a representative before the DOL. Therefore, the proper forum for these complaints is likely not the NRC. According to an exhibit attached to CFUR's "First Supplement," we understand that the individual involved is pursuing this question before the DOL.

V. Summary

In summary, CFUR has failed to justify the lateness of the petition and has not carried its "compelling" burden of balancing the last four factors. Accordingly, the petition to intervene must be and hereby is denied.[9]

It is so ORDERED.

For the Commission,

/s/ JOHN C. HOYLE
Assistant Secretary for
the Commission

Dated at Rockville, Maryland
21st day of December, 1988.

[9] On the day before the Commission was to vote on this order, the Commission received a "Second Supplement" to the Petition to Intervene from CFUR. The Supplement alleges various inadequacies in the installation of Kapton insulation at the Comanche Peak facility. This extremely late pleading does not contain any evidence or information which would change our decision on the outcome of the petition to intervene.

Supreme Court, U.S.
FILED
AUG 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-119

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CITIZENS FOR FAIR UTILITY REGULATION,

Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT TEXAS UTILITIES ELECTRIC COMPANY IN OPPOSITION

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August 13, 1990

QUESTION PRESENTED

Whether the United States Nuclear Regulatory Commission's (NRC or Commission) discretionary decision to deny Citizens for Fair Utility Regulation's (CFUR) petition to intervene and request for a hearing on the application of Texas Utilities Electric Company (TU Electric)[1] for an operating license for the Comanche Peak Steam Electric Station (Comanche Peak), that was filed nine years out-of-time, six years after CFUR voluntarily withdrew from those hearings, and one month after those hearings were dismissed, is a violation of the Commission's regulations, 10 C.F.R. § 2.714(a)(1) (1990).

[1] Texas Utilities Company is the parent company of Texas Utilities Electric Company.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT TEXAS UTILITIES ELECTRIC COMPANY IN OPPOSITION

Respondent, Texas Utilities Electric Company, respectfully requests that this Court deny the Petition for Writ of Certiorari to review the April 12, 1990 decision of the United States Court of Appeals for the Fifth Circuit. The Petition fails to articulate any special or important reasons for issuing a writ of certiorari. The Fifth Circuit's decision involves a routine procedural issue decided under well-established case law which raises no new or novel issue, involves no constitutional question, and creates no conflict with any decision of this Court or any other court.[2]

[2] The underlying decision of the Commission, *Texas Utilities Electric Co., et al.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605 (1988) (hereinafter CLI-88-12), was set forth in Appendix B to the Petition for Writ of Certiorari. The Commission modified CLI-88-12 by an April 20, 1989 decision, *Texas Utilities Electric Co., et al.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-89-6, 29 NRC 348 (1989), which is reprinted in Appendix A to this Brief in Opposition.

STATEMENT OF THE CASE

For the statement of the case, Respondent TU Electric adopts the description of the facts and procedural history in the opinion of the United States Court of Appeals for the Fifth Circuit, *Citizens for Fair Utility Regulation v. Nuclear Regulatory Commission,* 898 F.2d 51, 53-54 (5th Cir. 1990) (hereinafter *CFUR v. NRC*), and set forth in Appendix A to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, pp. A-2 to A-7.

SUMMARY OF ARGUMENT

The procedural issue presented by the Petition for Writ of Certiorari is a commonplace one and one which has been well-settled for over twenty years. The Commission, like other federal administrative agencies, has promulgated regulations governing untimely petitions to intervene in contested proceedings. 10 C.F.R. § 2.714 (1990). Pursuant to those regulations, as well as long-established Commission and federal court precedent, the Commission denied CFUR's petition to intervene and request for renewed hearings on the operating license for Comanche Peak, which was filed nine years out-of-time, six years after CFUR voluntarily withdrew from those hearings, and one month after those hearings had been duly dismissed by the Atomic Safety and Licensing Board (ASLB).

The United States Court of Appeals for the Fifth Circuit affirmed the Commission's decision and held that the Commission had not abused its discretion when it denied CFUR's extraordinarily untimely petition to intervene. In particular, the Fifth Circuit upheld the Commission's finding that CFUR had failed to meet its affirmative burden to show "good cause" for its untimely petition to intervene. *CFUR v. NRC,* 898 F.2d at 54-55. Furthermore, the Fifth Circuit affirmed the Commission's finding that CFUR had failed to make a compelling showing on the most important of the remaining factors that control a decision to grant or deny an

untimely petition to intervene, namely: (1) CFUR had failed to demonstrate an ability to contribute to the record; and (2) in light of CFUR's six year absence from the operating license hearings and the fact that those hearings had been dismissed, CFUR had failed to show that its admission would not delay those proceedings or broaden the issues. *Id.* at 55. CFUR does not contest these latter findings.

In its Petition for Writ of Certiorari, CFUR makes little attempt to address the factual or legal basis of either the Commission's or the Fifth Circuit's decision and, equally important, fails to articulate any sound basis for this Court to grant plenary review of the decision below. Instead, CFUR improperly attempts to raise issues never argued below[3] and reiterates, in a somewhat different form, the same arguments previously advanced and found to be meritless by both the Commission and the Fifth Circuit. Those arguments should similarly be rejected by this Court.

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[3] In its questions presented, CFUR suggests that the fifth amendment to the United States Constitution and the Atomic Energy Act of 1954 are somehow implicated by the Commission's denial of CFUR's intervention. Not surprisingly, CFUR never explains in its argument how either the due process clause or the provisions of the Atomic Energy Act were in any way violated by a decision to deny a petition to intervene filed years after the required filing date. Although CFUR mentioned the due process clause in its petition for review before the Fifth Circuit, it chose not to brief or argue this issue before the Fifth Circuit and never presented these arguments to the Commission. *See* Petition for Review at 4, *CFUR v. NRC*, 898 F.2d 51 (No. 89-4124 filed Feb. 15, 1989). Because these arguments were not presented to either the Commission or the Fifth Circuit, they may not be presented for the first time before this Court. *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952).

In a similar vein, although CFUR briefly mentioned problems with check valves before the Commission and the Fifth Circuit, CFUR never argued that the now-corrected problems with certain check valves constituted a "fundamental flaw." Hence, this legal argument is also improperly raised in the Petition for Writ of Certiorari. Nonetheless, we briefly address this argument later in this Brief in Opposition.

REASONS FOR DENYING THE WRIT

I. The Fifth Circuit And The Commission Correctly Decided That CFUR Failed To Establish "Good Cause" For Its Untimely Petition To Intervene.

The requirement to show good cause for an untimely intervention petition under section 2.714(a)(1) of the Commission's regulations is a reflection of a fundamental public interest associated with the Commission's licensing process.[4] The public's substantial interest in the timely and orderly conduct of Commission proceedings, "'fairness to all parties . . . and the obligation of administrative agencies to conduct their functions with efficiency and economy, require that Commission adjudications be conducted without unnecessary delays.'" *Nuclear Fuel Services, Inc.* (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975) (quoting 10 C.F.R. Part 2, Appendix A). The Commission's well-settled case law holds that late petitioners have a substantial burden to justify their tardiness. *Id.* Significantly, CFUR

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[4] In order to intervene in a proceeding after the period for intervention allowed by the Federal Register notice, an untimely petitioner has the burden to demonstrate that the balance of the following factors favor admission:

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

10 C.F.R. § 2.714(a)(1) (1990). Where an untimely petitioner, such as CFUR, has failed to demonstrate good cause, then it must make a compelling showing on the remaining factors. CLI-88-12, 28 NRC at 610; *CFUR v. NRC*, 898 F.2d at 54.

takes no issue with this principle, but merely with the Commission's failure to credit its excuse for its extraordinarily late filing.

CFUR filed its petition to intervene nine years after the deadline for filing, six years after voluntarily withdrawing from the Comanche Peak operating license hearings, and one month after the presiding ASLB issued an order dismissing those hearings. "[P]etitioners for intervention who inexcusably miss the filing deadline by not merely months, but by several years, have an enormously heavy burden to meet." *Puget Sound Power & Light Co., et al.* (Skagit Nuclear Power Project, Units 1 and 2), ALAB-559, 10 NRC 162, 172 (1979), *vacated on other grounds*, CLI-80-34, 12 NRC 407 (1980).

CFUR attempts to justify its failure to file a timely intervention by arguing that the termination of the hearing process, which resulted from a settlement between CASE[5] and TU Electric, somehow constitutes good cause for its untimely petition.[6] This very argument was previously made to both the Commission and the Fifth Circuit and flatly rejected.

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[5] Citizens Association for Sound Energy (CASE) was the only existing intervenor in the operating license hearings at that time.

[6] CFUR's description of the CASE-TU Electric Settlement so markedly misrepresents the Settlement's effect on the NRC's review of safety issues that a brief reply is in order. First, the Settlement did not limit the review of any relevant safety issues. The termination of an NRC licensing proceeding, without a substantive resolution by the ASLB of a previously contested issue, leaves the NRC Staff with the responsibility for resolving those safety or environmental issues that are relevant to the findings that must be made before a license can be issued. The CASE-TU Electric Settlement had no impact on the NRC Staff review. Second, the Settlement does not preclude CASE from bringing *any* safety concerns it might have to the attention of the NRC or administratively protesting any actions proposed by the NRC or TU Electric pursuant to the procedures set forth in 10 C.F.R. § 2.206 (1990). Indeed, under the terms of the Settlement, CASE is provided substantial funding and access to the plant in order to enable CASE to monitor ongoing activities and raise such issues with the NRC.

In its decision, the Commission held that a potential intervenor may not demonstrate "good cause" for untimely intervention by relying on an existing party to represent its views or positions and then attempting to substitute itself after the existing party has withdrawn. CLI-88-12, 28 NRC at 609. The Commission followed the Atomic Safety and Licensing Appeal Board decision in *Gulf States,* which held that reliance by a potential intervenor on an existing party, who subsequently withdrew from the proceedings, to represent the potential intervenor's interests does not constitute "good cause" under 10 C.F.R. § 2.714(a)(1). *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 796-97 (1977); *see also Puget Sound,* 10 NRC at 172-73; *Consolidated Edison Co. of New York* (Indian Point, Unit No. 2), LBP-82-1, 15 NRC 37, 39-40 (1982). A late petitioner assumes the risk that the existing litigants will not satisfy its expectations, and the withdrawal of the litigants was "a foreseeable consequence of the materialization of that risk . . . ." *Gulf States*, 6 NRC at 797 (quoting *Duke Power Co.* (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-440, 6 NRC 642, 645 (1977)).

The Commission's decision also pointed to a landmark decision of the United States Court of Appeals for the District of Columbia Circuit affirming a Commission order denying an untimely intervention petition. CLI-88-12, 28 NRC at 609-10. In that case, the court held:

> [A] person should not be entitled to sit back and wait until all interested persons who do so act have been heard, and then complain that he has not been properly treated. To permit such a person to stand aside and speculate on the outcome * * * and then permit the whole matter to be reopened in his behalf, would create an impossible situation.

Easton Utilities Commission v. Atomic Energy Commission, 424 F.2d 847, 851 (D.C. Cir. 1970) (quoting *Red River Broadcasting Co. v. Federal Communications Commission*, 98 F.2d

282, 286-87 (D.C. Cir.), *cert. denied*, 305 U.S. 625 (1938)). The court further stated:

> We do not find in statute or case law any ground for accepting the premise that proceedings before administrative agencies are to be constituted as endurance contests modeled after relay races in which the baton of proceeding is passed on successively from one legally exhausted contestant to a newly arriving legal stranger.

Id. at 852.

In its decision affirming the Commission's denial of CFUR's untimely intervention, the Fifth Circuit noted that an administrative agency has broad discretion in applying its own regulations[7] and specifically rejected "CFUR's allegation

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[7] In reviewing agency action, a court must defer to the agency's judgment unless the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1988); *see, e.g., Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983). This Court should afford the Commission the widest latitude where the action under review involves the agency's application and interpretation of its own regulations. *Groups United Against Radiation Danger v. NRC*, 753 F.2d 1144, 1148 (D.C. Cir. 1985); *see also Baltimore Gas*, 462 U.S. at 103; *CFUR v. NRC*, 898 F.2d at 54 (citing *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835 (1989)).

Similarly, when examining a determination that is within an agency's area of special expertise, a reviewing court must be at its "most deferential." *Baltimore Gas*, 462 U.S. at 103; *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984). In this case, a massive record had been developed over nine years of litigation and TU Electric had completed construction and design quality verification programs of unprecedented scope and depth. The Commission was uniquely situated to exercise its expertise in evaluating CFUR's purported issues, how they related to the existing Comanche Peak record and programs, if at all, and the nature of CFUR's expertise, if any, to make a contribution to a sound record. Great deference should be afforded to the Commission's expertise and, in the absence of any showing that the Commission abused its discretion, this Court should deny the Petition for Writ of Certiorari.

of surprise at CASE's settlement, [because] such action on the part of CASE, in and of itself, does not create good cause for CFUR's late-filed petition to intervene." *CFUR v. NRC*, 898 F.2d at 55. "NRC precedent consistently and clearly indicates that a potential intervenor cannot rely on another intervenor to present a certain view or represent certain interests without assuming the risk that the intervenor will not do so." *Id.* (citing *Gulf States*, 6 NRC at 760, and *Easton Utilities*, 424 F.2d at 847).

In an attempt to avoid the Fifth Circuit's ruling and the D.C. Circuit's holding in *Easton Utilities*, CFUR points to an earlier decision of the D.C. Circuit, *WFTL Broadcasting Co. v. Federal Communications Commission*, 376 F.2d 782 (D.C. Cir. 1967), apparently for the proposition that the withdrawal of CASE could, in certain circumstances, constitute good cause for an untimely intervention request. Petition for Writ of Certiorari at 11-12. CFUR relies on *WFTL* to support the claim that its untimely intervention should have been granted in order to permit it to represent the public interest. *Id.*

In *WFTL*, four competing applications for a radio station were filed with the Federal Communications Commission (FCC). Prior to any hearings, three applications were withdrawn and the matters at issue changed significantly. WFTL thereafter sought to intervene as a matter of right. The FCC denied the request. *WFTL*, 376 F.2d at 783. On review, the D.C. Circuit remanded the case to the FCC on the ground that the court was "not able to discern whether the Commission ha[d] in fact addressed itself to allowing intervention as an exercise of its discretion . . . " as provided in the FCC regulations upon a showing of good cause. *Id.* at 784. The court therefore directed the FCC to consider whether permissive or discretionary intervention should be allowed under the FCC's regulations. *Id.* at 785. The court never stated the very different proposition apparently advanced by CFUR,

that the withdrawal of parties from an administrative proceeding constitutes good cause. Indeed, precisely that argument was squarely addressed and rejected by the D.C. Circuit in its later decision in *Easton Utilities*, 424 F.2d at 851-52.

In contrast to the intervening party in *WFTL*, CFUR has been given every possible opportunity to demonstrate good cause for its untimely request for intervention and has failed to do so in every instance. Moreover, as to its purported desire to represent the public interest, the Commission and the Fifth Circuit found not only that CFUR had failed to establish good cause, but that CFUR had also failed to demonstrate any ability to contribute anything of value to the development of a sound record. CLI-88-12, 28 NRC at 610-11; *CFUR v. NRC*, 898 F.2d at 55. Thus, CFUR, although given the opportunity to do so, failed to show that it had any ability to represent its own or any other interest in the proceeding. Significantly, CFUR does not challenge either the Commission's decision on that issue or the Fifth Circuit's affirmance of that decision.

CFUR also relies on the Commission's decision in *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-83-25, 18 NRC 327 (1983), for the proposition that the withdrawal of an intervenor in an NRC licensing proceeding constitutes a "recent event" and thus good cause for an untimely intervention petition. The term "recent event" as used in *Metropolitan Edison* and Commission case law does not include the withdrawal of existing parties but involves changes in regulatory standards or new facts or evidence on substantive issues, none of which were present in the instant case. *See Cincinnati Gas & Electric Co., et al.* (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 572-73, 574-75 (1980); *Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982). *Metropolitan Edison* does not support the proposition that the CASE-TU Electric Settlement and the withdrawal of

CASE as a party constitute a "recent event" providing a basis for CFUR's untimely intervention.

Finally, CFUR relies on *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-903, 28 NRC 499 (1988), and *Union of Concerned Scientists v. NRC*, 735 F.2d 1437 (D.C. Cir. 1984), *cert. denied sub nom. Arkansas Power & Light Co. v. Union of Concerned Scientists*, 469 U.S. 1132 (1985), to support its claim that certain (now corrected)[8] problems experienced by TU Electric with check valves constitute a "fundamental flaw" requiring the reopening of the record. Petition for Writ of Certiorari at 11-15. Apart from the fact that this legal issue was never raised before either the Commission or the Fifth Circuit, CFUR's argument is irrelevant to a determination of whether the denial of its intervention petition was an abuse of discretion for two reasons.

First, the case law regarding "fundamental flaws" has little or no application to problems experienced with specific pieces of equipment in a nuclear power plant. Rather, a fundamental flaw generally refers to serious programmatic or generic flaws in a program such as an emergency preparedness plan which is material to a licensing decision.[9] Indeed, the law could hardly be otherwise. Given the complexity of nuclear power plants, if any single problem with a piece of equipment could result in new hearings at the request of would-be intervenors, no nuclear power plant could escape virtually never-ending hearings.

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[8] The problems experienced with the check valves were corrected by TU Electric and inspected by the NRC. The plant is now in commercial operation.

[9] *See Long Island Lighting Co.*, 28 NRC at 505 (a fundamental flaw "reflects a failure of an essential element of the [emergency preparedness] plan, *and*, second, it can be remedied only through a significant revision of the plan."). A fundamental flaw is never found on the basis of "minor or ad hoc problems" such as discrete and isolated equipment problems. *Union of Concerned Scientists*, 735 F.2d at 1448.

Second, CFUR does not explain how its new argument regarding a "fundamental flaw" in any way affects the Commission's decision that CFUR failed to establish good cause for its untimely intervention. At best, CFUR simply argues that if a "fundamental flaw" exists then the Commission, at the behest of *an existing party*, could have reopened the record. Whatever the merits of that proposition, it most assuredly adds nothing to the question of whether the Commission abused its discretion in finding that CFUR failed to demonstrate good cause for its untimely request for intervention.

II. The Petition For Writ Of Certiorari Does Not Raise An Important Unsettled Question Of Federal Law.

CFUR's Petition for Writ of Certiorari makes no attempt to affirmatively demonstrate that it satisfies the standards for grant of certiorari embodied in this Court's Rule 10. There is no attempt to show that the Fifth Circuit's decision conflicts with any decision of this Court, another United States court of appeals, or that of a state court of last resort. Sup. Ct. R. 10.1(a), (c). Nor is there any claim that the Fifth Circuit "departed from the accepted and usual course of judicial proceedings . . . ." Sup. Ct. R. 10.1(a). At best, CFUR is perhaps implicitly arguing that the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. *See* Sup. Ct. R. 10.1(c).

CFUR's Petition revolves around well-settled and straightforward questions of federal law. CFUR is not contesting the validity of the NRC's longstanding regulation or case law governing untimely petitions. Rather, CFUR is contesting an exercise of the Commission's discretion to deny CFUR's petition to intervene and request for a hearing that was filed nine years out-of-time, six years after CFUR had already withdrawn from the Comanche Peak operating license hearings, and one month after those hearings had been duly dismissed. In reality, the issue presented by CFUR's Petition for Writ of Certiorari is whether the Commission

abused its discretion in denying CFUR's untimely intervention and regulating the orderly conduct of its licensing process.[10] This routine procedural issue, which was properly addressed by the Fifth Circuit, neither rests on nor raises any important question of federal law that is worthy of consideration by this Court.

Nor is there any possible merit to CFUR's claim that the CASE-TU Electric Settlement, which resulted in the dismissal of the Comanche Peak operating license hearings, was somehow irregular or improper. On June 28, 1988, after nine years of litigation, CASE and TU Electric reached an agreement that resolved the controversy between the parties and provided the basis for the dismissal of the then-ongoing operating license proceeding. Under the 1988 CASE-TU Electric Settlement, CASE agreed to exchange its rights to litigate residual issues on the implementation of TU Electric's quality validation program for a set of additional rights: access to the plant; the resources to retain experts to monitor issues of interest to CASE; and the ability to obtain resolution of any concerns through the NRC Staff. *Texas Utilities Electric Co., et al.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-88-18B, 28 NRC 103, 107-135 (1988) (Exhibits A and B (the Joint Stipulation and Settlement Agreement, respectively)); Tr. 25,266-70, 25,287-88. The ASLB fully considered the terms of the 1988 CASE-TU Electric Settlement and found it consistent with Commission policy before dismissing the operating license proceeding. *Texas Utilities Electric Co., et al.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-88-18A, 28 NRC 101, 102 (1988); LBP-88-18B, 28 NRC at 103; Tr. 25,287-88.

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[10] In fact, CFUR admits that the Commission "does not violate either the due process clause of the fifth amendment nor the act of congress [The Atomic Energy Act of 1954] that creates a right in citizens to be heard merely by creating and applying regulations designed to promote the orderly conduct of agency business." Petition for Writ of Certiorari at 6.

The Commission has a longstanding policy that encourages "the fair and reasonable settlement of contested initial licensing proceedings . . . ." 10 C.F.R. § 2.759 (1990). In promulgating this policy:

> The Commission [was] concerned not only with its obligation to the segment of the public participating in licensing proceedings but also with its responsibility to the general public — a responsibility to arrive at sound decisions, whether favorable or unfavorable to any particular party, in a timely fashion. The Commission expressly recognize[d] the positive necessity for expediting the decisionmaking process and avoiding undue delays.

37 Fed. Reg. 15,127 (July 28, 1972). Permitting CFUR to intervene nine years late would effectively eviscerate this policy and would make settlements of NRC proceedings virtually impossible.

In summary, the Commission's denial of CFUR's extraordinarily untimely petition and the Fifth Circuit's affirmance of that denial were based on the specific facts of this case and were grounded on sound public policy and well-settled case law. Accordingly, this case presents no unsettled issues of federal law that are worthy of review by this Court.

CONCLUSION

CFUR's Petition presents no special or important reason for issuing the writ. The case involves a narrow, fact-specific and routine procedural issue which was correctly decided below in accordance with long-established and well-founded precedent. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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August 13, 1990

APPENDIX A

CLI-89-6

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Lando W. Zech, Jr., Chairman
Thomas M. Roberts
Kenneth M. Carr
Kenneth C. Rogers
James R. Curtiss

In the Matter of **Docket Nos. 50-445-OL**
50-446-OL
50-445-CPA

TEXAS UTILITIES ELECTRIC COMPANY, *et al.*
(Comanche Peak Steam Electric Station, Units 1 and 2)

April 20, 1989

MEMORANDUM AND ORDER

I. INTRODUCTION

This case is before the Commission on two motions by Mr. Joseph Macktal, an individual petitioner. Mr. Macktal asks the Commission for (1) "limited intervention" in the Comanche Peak proceedings and (2) reconsideration of its recent order denying a petition by the Citizens for Fair Utility Regulation ("CFUR") to intervene late in the Comanche Peak proceedings. *See* CLI-88-12, 28 NRC 605 (1988). The

applicant, Texas Utilities Electric Company ("TUEC") and the NRC Staff have responded in opposition to both motions. After due consideration, we have decided to deny both motions for the reasons that follow.

II. BACKGROUND

In order to understand how Mr. Macktal's motions fit into the tortured history of the Comanche Peak proceedings, a brief review of history — both ancient and recent — will be necessary. The Commission published receipt of TUEC's application for an operating license in the *Federal Register* on May 12, 1978. *See* 43 Fed. Reg. 20,583. Following publication of the Notice of Opportunity for Hearing, 44 Fed. Reg. 6995 (Feb. 5, 1979), three organizations filed timely petitions to intervene and requests for hearing: Citizens Association for Sound Energy ("CASE"), Citizens for Fair Utility Regulation ("CFUR"), and Texas Association of Community Organizations for Reform Now/West Texas Legal Services ("ACORN"). The State of Texas filed a timely petition to participate as an interested state, pursuant to 10 C.F.R. §2.715(c). Therefore, the Commission established a Licensing Board, 44 Fed. Reg. 15,813 (Mar. 15, 1979), which subsequently admitted CASE, CFUR, and ACORN as Intervenors and Texas as an interested state. Order Relative to Standing of Petitioners to Intervene (June 27, 1979). On June 16, 1980, the Board issued an order admitting twenty-five contentions and three Board questions for litigation.

On July 21, 1981, the Board accepted ACORN's voluntary motion for dismissal from the proceeding. Likewise, on March 5, 1982, the Board accepted CFUR's voluntary withdrawal from the proceeding. The proceeding then continued unabated with CASE as the sole intervenor. By 1984, the proceeding had resolved all contentions except Contention 5, relating to Quality Control/Quality Assurance ("QA/QC"). In 1986, a second proceeding commenced relating to TUEC's

request for an amendment to its Construction Permit for Unit 1 seeking additional time to complete construction.

On July 1, 1988, CASE and TUEC reached a settlement agreement resolving all matters at issue between them. Essentially, CASE agreed to withdraw from the proceedings and TUEC agreed to reimburse CASE for certain expenses incurred during the litigation, to install a CASE representative in an oversight position at Comanche Peak, and to provide that representative with expenses and technical assistance. CASE and TUEC submitted a joint motion to dismiss the proceedings as settled and the Licensing Board granted the motion on July 13, 1988.

Shortly thereafter, on August 11, 1988, CFUR filed a petition before the Licensing Board to "re-intervene" in the proceedings. CFUR also filed two "Supplements" to its initial petition. The NRC Staff and TUEC responded to the initial petition and the "First Supplement." Initially, there was some confusion over which Commission tribunal had jurisdiction over CFUR's petition. In order to avoid any confusion and to spare the parties needless expense and delay, the Commission itself took jurisdiction of the matter.

On December 16, 1988, while the CFUR petition was still pending, Mr. Macktal filed a motion before the Licensing Board, seeking "leave to proceed as an intervenor limited to questions of the scope, impact and interpretation" of this settlement agreement. Mr. Macktal's motion states that he reviewed the Staff's response in early November and TUEC's response in early December (Motion for Limited Intervention at 1), and that he filed this attempt to intervene in order to rebut the interpretations assigned the disputed agreement

by the Staff and TUEC.[1] The NRC Staff has responded in opposition, arguing that Mr. Macktal does not meet the criteria for a late-filed petition for intervention. *See* 10 C.F.R. §2.714(a)(1)(i)-(v). TUEC did not respond.

On December 21, 1988, the Commission issued CLI-88-12, denying the CFUR petition to intervene, based upon an application of the five-factor test contained in §2.714(a)(1)(i)-(v). *See* CLI-88-12, *supra*. However, the Commission did not rule on Mr. Mactal's motion for limited intervention because the NRC Staff and TUEC had not yet had a chance to respond to it. Mr. Macktal then filed the second motion before us today seeking reconsideration of CLI-88-12, alleging that he was "prejudiced" by that decision.

Specifically, Mr. Macktal requests that the Commission vacate Part IV of CLI-88-12 (in which we discussed the disputed settlement agreement) or, in the alternative, stay the entire order and grant him the relief requested in his earlier motion, i.e., limited intervention status for the purpose of explaining his views on the disputed settlement agreement. Mr. Macktal alleges that the Commission misconstrued or misinterpreted the settlement agreement in reaching its decision in CLI-88-12 and that the decision contains a number of "serious errors of law." Mr. Macktal does not allege any errors in the Commission's determination that CFUR's petition does not meet the five-factor test found in §2.714(a)(1)(i)-(v).

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[1] We infer from Mr. Macktal's motion that he believes that he was prejudiced because neither he nor his counsel was served with the responses by Staff or TUEC to CFUR's petition to intervene or to the "First Supplement." We find no indication in the record that either he or his counsel had filed a notice of appearance or had sought to be served by any party to the proceeding. Our last communication from Mr. Macktal's counsel indicated that they were withdrawing from any participation in the case. *See* Notice of Withdrawal (July 15, 1988). Therefore, we know of no obligation for counsel for the NRC Staff, TUEC, or even CFUR to serve Mr. Macktal with copies of their pleadings.

In response, the NRC Staff argues that Mr. Macktal does not have standing to seek reconsideration because he had not been admitted as a party to the proceeding at the time CLI-88-12 was issued. In its response, TUEC argues that Mr. Macktal has not attempted to demonstrate that his motion meets the Commission's criteria for granting a stay of a final order.[2]

III. THE MOTION FOR "LIMITED INTERVENTION"

The first matter before us is Mr. Macktal's motion for limited intervention.[3] In the motion, Mr. Macktal "requests leave to proceed as an intervenor limited to questions of the scope, impact and interpretation of the January 2, 1987 illegal settlement agreement." Motion for Limited Intervention at 2. Mr. Macktal claims that he "may be prejudiced in his 'reopened' Department of Labor proceeding as well as other

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[2] Mr. Macktal has also filed a pleading which he has styled as a "Reply" to the responses filed by Texas Utilities and the NRC Staff. NRC regulations specifically reject such pleadings. "The moving party shall have no right to reply [to an answer in response to a motion], except as permitted by the presiding officer or the Secretary or the Assistant Secretary." 10 C.F.R. §2.730(c). Nevertheless, in this situation, the Commission has reviewed this pleading in an effort to afford Mr. Macktal every opportunity to present his case. Texas Utilities has responded with an additional pleading of its own.

[3] Mr. Macktal styled his motion as being "[b]efore the Nuclear Regulatory Commission Atomic Safety and Licensing Board." The Staff likewise styled its opposition to the motion for limited intervention as "[b]efore the Atomic Safety and Licensing Board." (TUEC did not file an opposition.) Over a month after the last pleading directed to the matter, the presiding officer of the Licensing Board panel which had been hearing the original Comanche Peak proceedings notified the Office of the Secretary that it was his belief that no panel of the Licensing Board existed which could review the motion and that, therefore, the Licensing Board did not intend to take any action on the motion whatsoever. Therefore, the Commission has taken jurisdiction to rule on this question.

litigation which may occur regarding the correct interpretation of the January 2 1987 'Settlement Agreement[,]' " and that "no party now before this tribunal shares [his] interest regarding the Settlement Agreement." *Id.*

The motion explicitly states that it seeks only "limited intervention" for a specific purpose, i.e., to brief the Commission on Mr. Macktal's views on the disputed settlement agreement. But the motion makes no attempt to demonstrate compliance with the required criteria for filing an untimely petition to intervene in an ongoing proceeding found in §2.714(a)(1)(i)-(v). For example, the motion does not discuss the standing and interest criteria, much less show that they are satisfied. Likewise, the motion includes no discussion of the five factors that a late-filed petition for intervention must address.[4] Therefore, we cannot grant the motion for limited intervention to gain party status under §2.714(a)(1)(i)-(v). However, we have considered Mr. Macktal's submission in our review of the disputed settlement agreement. *See* 10 C.F.R. §2.715(d).

IV. THE MOTION FOR RECONSIDERATION AND STAY OF CLI-88-12

Initially, we find that Mr. Macktal does not have standing to seek a stay or reconsideration of the Commission's

[4] We contrast this approach with that of CFUR which, while not persuading us that they satisfied the five factors, still attempted to address them — at least in the context of the operating license ("OL") proceeding. *See* 28 NRC at 608-12 & n.7.

decision in CLI-88-12 because he was not *a party* to the proceeding when the decision was issued.[5] Commission regulations specifically provide that "[a] petition for reconsideration may be filed by *a party* within ten (10) days after the date of decision." 10 C.F.R. §2.771(a) (emphasis added). Similarly, "[w]ithin ten (10) days after service of a decision or action *any party* to the proceeding may file an application for a stay of the effectiveness of the decision or action . . . ." 10 C.F.R. §2.788(a) (emphasis added).

Furthermore, Mr. Macktal does not have the requisite interest to seek reconsideration of this decision, i.e., he has not demonstrated an interest that might be affected by the proceeding. In fact, in his pleadings he argues that only the Secretary of Labor has jurisdiction to interpret the scope and meaning of his settlement agreement with Brown & Root. Accordingly, we find no basis for Mr. Macktal to argue that the NRC's comments on the settlement agreement in CLI-88-12 could have caused him legal harm. Nothing in CLI-88-12 hinders Mr. Macktal from presenting his objections to the settlement agreement to the Secretary of Labor or prevents the Department of Labor from invalidating that agreement if it so chooses. Furthermore, we do not believe that our statements in CLI-88-12 preclude his litigation of the agreement before the DOL under the principles of res judicata or collateral estoppel because neither Mr. Macktal nor Brown & Root were parties to CLI-88-12.

Moreover, Mr. Macktal has not even attempted to demonstrate that he meets the Commission's stay criteria. Under Commission regulations and longstanding Commission precedent, a party seeking a stay must show that it meets

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[5] In his "reply," Mr. Macktal argues that the filing of his motion for limited intervention made him a party to the proceeding, citing *Seacoast Anti-Pollution League of New Hampshire v. NRC*, 690 F.2d 1025, 1028 (D.C. Cir. 1982). We have reviewed this case and it does not stand for the proposition for which it is cited. In fact, the issue of standing is never discussed in that case, either as a part of the merits of the case or in dicta.

a balancing of the traditional four factors that would cause a court to grant a preliminary injunction including (1) the moving party's likelihood of success on the merits, (2) irreparable harm to the moving party absent a stay, (3) harm to any other party in the event of a stay, and (4) the public interest. 10 C.F.R. §2.788(e)(1)-(4). *See, e.g., Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 803 n.3 (1984); *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-81, 5 AEC 348 (1972). *See generally Virginia Petroleum Jobbers Ass'n v. FPC,* 259 F.2d 921, 925 (D.C. Cir. 1958).

V. CONCLUSION

We have determined that Mr. Macktal is not entitled to intervene as a party and does not have standing to seek reconsideration of the Commission's findings in CLI-88-12. Nevertheless, we take note of Mr. Macktal's concerns regarding his perception that our statements in CLI-88-12 constituted a possible endorsement of the settlement agreement. We emphasize that in CLI-88-12, we examined the agreement solely to determine if it prohibited Mr. Macktal from bringing his concerns to the NRC Staff and found that it did not. Our decision in CLI-88-12 was not intended as a Commission "stamp of approval" on the disputed agreement. We did state that "we do not see a violation of federal law or NRC regulation." CLI-88-12, 28 NRC at 613. But our decision denying CFUR's petition should not have depended on anything in the agreement at all. Assuming *arguendo* that the agreement violated some law or regulation, neither Mr. Macktal nor CFUR has demonstrated that the disputed agreement constitutes "good cause" for CFUR's late intervention in the operating license and construction permit amendment

proceedings under 10 C.F.R. §2.714.[6] The essential basis for denying CFUR's late intervention — that a party may not rely upon another party to represent its position and interest without assuming the risk that it will not do so — is independent of the validity of the agreement.

We are also aware that Mr. Macktal has challenged the settlement agreement before the DOL, which is at this point the appropriate forum for such action. *See* Memorandum of Understanding, 47 Fed. Reg. 54,585 (Dec. 3, 1982). Therefore, we withdraw any comment on the agreement's acceptability or legality we made in CLI-88-12 and we decline at this point to comment further on the disputed settlement agreement because it is the subject of a pending DOL case.

Finally, we note that Mr. Macktal admits that he withheld information from the NRC Staff during discussions in 1986. *See* Second Macktal Affidavit at 1. That withholding of information is regrettable. We request Mr. Macktal to promptly bring any concerns he has to the NRC Staff for their

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[6] The most that can be said for the agreement regarding the test for late intervention is that Mr. Macktal's presence might support CFUR's ability to contribute to the development of a sound record. 10 C.F.R. §2.714(a)(1)(iii). However, such support is not sufficient to overcome CFUR's lack of "good cause" under the required balancing of these five factors.

resolution.[7] The Staff will review Mr. Macktal's technical concerns about Comanche Peak. Such review is a normal Staff practice.

[7] Mr. Macktal signed a confidentiality agreement with the NRC Staff which protected the nature of his concerns but not the fact that he brought concerns to the NRC or his identity. *See* NRC Staff Response to CFUR's First Supplement at 5. Under that agreement, he provided allegations to the NRC Staff which were addressed in regular inspection reports at the Comanche Peak facility. *Id.* The Staff has attempted to provide Mr. Macktal with copies of those reports and Mr. Macktal has never explained or expressed any disagreement with resolution of any specific allegation. *Id.* If Mr. Macktal is dissatisfied with the resolution of those items or if he has other items of concern, including any that he may have deliberately withheld from the NRC Staff during interviews in 1986 (*see* Second Macktal Affidavit at 1), he should bring those matters to the attention of the Comanche Peak Division of the Office of Nuclear Reactor Regulation ("NRR") — formerly the Office of Special Projects — or address them directly to the Director of NRR under 10 C.F.R. §2.206. While we have in essence "vacated" Part IV of CLI-88-12, we still adhere to our statement in that order that the disputed agreement does not prevent Mr. Macktal from bringing any of his safety concerns directly to the NRC Staff.

It is so ORDERED.[8]

For the Commission[9]

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of April 1989.

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[8] Mr. Macktal's motion for oral argument on the motion for reconsideration is denied. Mr. Macktal has also filed a "Motion to Be Served with Notice of Commission Proceedings," apparently seeking specific notice of the date of issuance of this order. Normally, the Commission publishes weekly in the *Federal Register* a notice of all Commission meetings for the next 4 weeks, including affirmation sessions and the matters to be affirmed. When matters before the Commission are expedited, the Commission attempts to provide at least one week's notice of the subject of affirmation sessions to all interested parties. In this case, the Commission has attempted to expedite the issuance of this order. Accordingly, the Office of the General Counsel has notified Mr. Macktal's counsel of the date and time of this session. Therefore, we have in essence served Mr. Macktal with the requested notice of the proceedings in this matter.

[9] Commissioner Carr was not present for the affirmation of this order; if he had been present he would have approved it. Commissioner Curtiss was unavailable to participate in this decision.

(3)

No. 90-119

Supreme Court, U.S.
FILED
SEP 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

CITIZENS FOR FAIR UTILITY REGULATION, PETITIONER

v.

NUCLEAR REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Nuclear Regulatory Commission abused its discretion in denying petitioner's untimely motion to intervene in an administrative proceeding.

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In the Supreme Court of the United States

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No. 90-119

CITIZENS FOR FAIR UTILITY REGULATION, PETITIONER

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. A1-A9) is reported at 898 F.2d 51. The decision of the Nuclear Regulatory Commission (Pet. App. B1-B11) is reported at 28 N.R.C. 605.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1990. The petition for a writ of certiorari was filed on July 10, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges the decision of the Nuclear Regulatory Commission denying its petition to intervene

in an already concluded administrative proceeding on the ground that the petition was untimely and did not satisfy the requirements established by the Commission's rules of practice for the admission of untimely petitions.

1. Under the Atomic Energy Act of 1954 (Act), 42 U.S.C. 2011 *et seq.*, the NRC is authorized to license and regulate the construction and operation of nuclear power plants. Section 189(a) of the Act, 42 U.S.C. 2239(a), requires the Commission to provide an opportunity for a hearing on certain proposed actions, including the granting of a license to operate such a power plant.

In order to facilitate the orderly conduct of agency business, the Commission has developed rules of practice governing the submission of requests for hearings and the conduct of the hearings themselves. 10 C.F.R. Pt. 2. Those rules provide that an interested person may intervene in an agency licensing proceeding as a matter of right within the time limit contained in the *Federal Register* notice announcing the proposed agency action. Petitions to intervene filed after that time are evaluated on the basis of five enumerated criteria: (1) whether there is good cause for the failure to file on time; (2) the availability of other means to protect the petitioner's interests; (3) the extent to which the petitioner's participation may be expected to assist in developing a sound record; (4) the extent to which the petitioner's interest will be represented by existing parties; and (5) the extent to which the petitioner's participation will broaden the issues or delay the proceeding. Pet. App. A4; 10 C.F.R. 2.714(a)(1)(i)-(v). Where there is no "good cause" for the untimeliness of the petition for intervention, the Commission requires a "compelling showing" on the remaining four factors before allowing intervention. See, *e.g. Nuclear Fuel Services Inc.* (*West Valley Reprocessing Plant*), CLI-754, 1 N.R.C. 273 (1975).

2. On February 28, 1978, Texas Utilities Electric Company (TU Electric) applied for a license to operate the Comanche Peak Steam Electric Station, a two-unit nuclear power plant that it was constructing approximately 55 miles southwest of Ft. Worth, Texas. Petitioner and two other organizations, the Citizens Association for Sound Energy (CASE), and the Association of Communities for Reform Now (ACORN), filed timely requests to intervene. All three organizations participated in the proceeding until ACORN and petitioner voluntarily withdrew in 1981 and 1982, respectively (Pet. 7; Pet. App. A2, B2). The proceeding then continued before the NRC's Atomic Safety and Licensing Board with CASE as the sole intervenor. By 1984, the proceeding had resolved all disputed issues except a contention relating to quality assurance and quality control in the construction of the plant (Pet. App. A2). In 1986, the NRC convened a related proceeding to consider TU Electric's request to seek additional time to complete construction of Unit 1 of the Comanche Peak Steam Electric Station.

3. On June 28, 1988, CASE and TU Electric reached a settlement agreement. Accordingly, CASE, TU Electric, and the NRC staff (a statutory party to all NRC administrative proceedings) submitted a joint motion to dismiss the administrative proceedings as settled (Pet. App. A3). On July 13, 1988, the Licensing Board held a hearing to review the settlement agreement. After receiving comments from the parties and interested members of the public, including petitioner, and reviewing the documents underlying the agreement, the Licensing Board issued an order publishing those documents and dismissing the proceedings. *Ibid.* See *Texas Utilities Electric Co.* (*Comanche Peak Steam Electric Station, Units 1 and 2*), LBP-88-18B, 28 N.R.C. 103 (1988).

4. On August 11, 1988, petitioner filed a request to intervene in the already settled administrative proceedings, claiming that it satisfied the five criteria enumerated in 10 C.F.R. 2.714(a)(1)(i)-(v). In this request and two later filed supplements, petitioner asserted that it withdrew from the proceedings due to financial considerations and on the assumption that CASE would continue to litigate the proceedings (Pet. App. A6, B2-B3); that it had no alternative means to protect its interests; that it could make important contributions to the record; and that its late intervention would not cause any delay in the proceedings (*id.* at B3-B4).

5. On December 21, 1988, the Commission denied petitioner's request for intervention, finding that petitioner had failed to satisfy the required criteria as interpreted in the Commission's prior decisions (Pet. App. B1-B11).[1] The Commission first determined that petitioner had failed to demonstrate "good cause" for the lateness of its intervention request (Pet. App. B5-B6). Accordingly, petitioner was obligated to make a compelling showing that the remaining four factors weighed in support of its petition. The Commission found that petitioner had not made such a showing. Although two of the four factors supported the petition for late intervention, the ones accorded the most weight—the ability to contribute to the record and the likelihood of delay—weighed against intervention (*id.* at B7-B9). The Commission therefore refused to permit petitioner to intervene.

6. Petitioner sought review of that decision in the court of appeals, alleging that the Commission's decision was arbitrary and capricious.[2] The court of appeals af-

[1] The opinion was subsequently amended in a way not relevant to the issues raised in this petition. See Resp. Br. in Opp. App. A.

[2] On the eve of oral argument, petitioner applied for a stay to prevent the operation of the Comanche Peak plant pursuant to the NRC license, pending a decision on the merits. After oral argument, the

firmed the Commission's decision. It concluded that the Commission correctly found that petitioner had not demonstrated "good cause" for the lateness of its requested intervention, and that the Commission's balancing of the remaining four factors was not an abuse of discretion. Pet. App. A1-A9.

ARGUMENT

Neither the Commission nor the court of appeals established any new principle of law or Commission procedure. Instead, the Commission applied clear and consistent administrative precedent to an extremely late request for discretionary intervention and denied that request because petitioner did not satisfy the regulatory requirements. The court of appeals applied well-settled legal principles in reviewing the Commission's fact-bound decision and determined that the Commission did not abuse its discretion in reaching that decision. Moreover, the court of appeals' decision is consistent with decisions of other courts of appeals that have considered similar issues. Thus, the case presents no issue worthy of this Court's attention.

1. The court of appeals properly concluded that the Commission's decision to deny the petitioner's request for late intervention was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). See, *e.g.*, *Baltimore Gas & Electric Co.* v. *NRDC, Inc.*, 462 U.S. 87, 90, 105-106 (1983). Moreover, the court of appeals correctly applied the established principle that when reviewing an agency's application and interpretation of its own regulation, "the ultimate criterion

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court of appeals denied the stay on February 6, 1990. Justice White also denied a stay. Pet. 4; *Citizens for Fair Utility Regulation* v. *United States Nuclear Regulatory Comm'n*, No. A-681 (Mar. 30, 1990).

is the administrative interpretation, which becomes of controlling weight unless it is clearly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). See also *Robertson* v. *Methow Valley Citizens Council*, 109 S. Ct. 1835, 1850 (1989). Specifically, the court of appeals found that the Commission followed its long-standing administrative precedent in determining that petitioner had not established "good cause" for its extremely late petition. Pet. App. A5-A7. The court of appeals also found that the Commission did not abuse its discretion in balancing the remaining four factors against allowing late intervention. *Id.* at A7-A9. These rulings on routine questions of administrative law are correct, and in any event do not involve matters warranting further review.

a. Petitioner argues primarily that its petition for late intervention was justified by the settlement between CASE and TU Electric that terminated the NRC hearing on Comanche Peak. Pet. 9-13. But the court of appeals correctly found that "NRC precedent consistently and clearly indicates that a potential intervenor cannot rely on another intervenor to present a certain view or represent certain interests without assuming the risk that the intervenor will not do so." Pet. App. A6 (citing, *inter alia*, *Easton Utilities Comm'n* v. *AEC*, 424 F.2d 847 (D.C. Cir. 1970)).

In *Easton*, the District of Columbia Circuit upheld the Commission's position in a situation virtually identical to the instant one. As the *Easton* court noted (424 F.2d at 851, quoting *Red River Broadcasting Co.* v. *FCC*, 98 F.2d 282, 286-287 (D.C. Cir.), cert denied, 305 U.S. 625 (1938)):

> "[A] person should not be entitled to sit back and wait until all interested persons who do [timely intervene] have been heard, and then complain that he has not

> been properly treated. To permit such a person to stand aside and speculate on the outcome * * * and then permit the whole matter to be reopened in his behalf, would create an impossible situation."

The *Easton* court further explained that "[w]e do not find in statute or in case law any ground for accepting the premise that proceedings before administrative agencies are to be constituted as endurance contests modeled after relay races in which the baton of proceeding is passed on successively from one legally exhausted contestant to a newly arriving legal stranger." 424 F.2d at 852.

In the instant case, petitioner voluntarily withdrew from the NRC administrative proceedings in 1982 and sat back to see if the outcome would be favorable. When the outcome was not to its liking, petitioner attempted to re-intervene. As the court of appeals noted (Pet. App. A7 (quoting Pet. App. B6)):

> [a]t the time of the filing of the petition to intervene, [petitioner] was a legal stranger to the action. As the NRC succinctly stated, "[petitioner] assumed the risk that CASE would not represent its interest to its complete satisfaction when it withdrew from the proceedings in 1982. It cannot now complain when that risk becomes reality."

The *Easton* court was quite correct in concluding (424 F.2d at 851) that, to "permit the whole matter to be reopened * * * would create an impossible situation." For example, even if a license applicant met all the objections of those who actively opposed the license and the administrative proceeding came to an end through settlement, nothing would have been achieved if the proceeding could be reopened at the request of any person who claimed reliance on the satisfied intervenor. Petitioner's position

would, in many situations, effectively render settlement agreements nugatory.

Moreover, the Commission—like any other regulatory body—is entitled to stability in its proceedings. An agency cannot have its proceedings subject to the whims of intervenors who withdrew only to re-enter whenever they do not like the result achieved by those remaining in the proceeding after they leave. In essence, petitioner would deny the agency, the applicant, the courts, and the general public the benefits of finality in administrative proceedings by requiring those parties to endure the kind of administrative "relay race" described by the *Easton* court (424 F.2d at 852).

b. Petitioner argues that the Commission "fail[ed] to examine seriously the nature and timing of the private settlement agreement ending public licensing proceedings" (Pet. 12-13). That is simply incorrect. The Licensing Board held a full-scale hearing on the settlement agreement, at which the Board entered all agreements and related documents on the record, save only those items which would invade the personal privacy of persons who had signed individual settlement agreements. There was thus a thorough investigation of the settlement agreement and the circumstances surrounding it. Moreover, the NRC continues to oversee the safety of activities at Comanche Peak—as it does at every nuclear plant in the United States, regardless of whether there is an administrative hearing in progress.

The Commission again specifically considered the circumstances surrounding the settlement agreement when reviewing and rejecting petitioner's untimely petition to intervene. See, *e.g.*, Pet. App. B3-B6. The court of appeals also considered and rejected petitioner's argument that its surprise at the settlement agreement constituted "good

cause" for the untimeliness of its attempt to intervene. *Id.* at A6.

c. The decision of the court appeals is clearly consistent with the decisions of other courts of appeals in similar cases. See, *e.g.*, *Easton Utilities Comm'n* v. *AEC*, *supra*. Contrary to petitioner's suggestion (Pet. 11-12), *WFTL Broadcasting Co* v. *FCC*, 376 F.2d 782 (D.C. Cir. 1967), is inapposite. *WFTL Broadcasting* concerned an agency denial of a request to intervene as a matter of *right*, and the court of appeals remanded the case for the FCC to consider the possibility of intervention as a matter of *discretion*, 376 F.2d at 784-785. Here, petitioner virtually concedes that it has no *right* to intervene (Pet. 6), and the agency has fully and correctly considered whether discretionary intervention should be permitted. The instant petition to intervene came nine years after proceedings began, seven years after petitioner withdrew from the proceedings voluntarily, and one month after the proceedings had been dismissed. This case, in short, involves no significant question of law, but centers solely around a fact-specific application of the NRC's *discretionary* intervention standards. See 10 C.F.R. 2.714(a)(1)(i)-(v).

2. Finally, petitioner suggests (Pet. 13-15) that a recurring problem with check valves at the Comanche Peak plant constitutes a "fundamental flaw" which, according to petitioner, mandates a reopening of the NRC administrative proceedings.[3] Petitioner argues that *Union of Con-*

[3] While petitioner argued before the Commission that the check valves were defective, petitioner did not contend that those valves constituted a "fundamental flaw" justifying reopening of the licensing proceedings either in its petition to intervene before the Commission or in its petition to review the Commission's decision before the court of appeals. Thus, the argument is not properly raised in the petition for certiorari. See, *e.g.*, *FPC* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498-501 (1955); *Unemployment Compensation Comm'n* v. *Ara-*

cerned Scientists v. *NRC*, 735 F.2d 1437 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985), and *Long Island Lighting Co.* (*Shoreham Nuclear Power Station, Unit 1*), ALAB-903, 28 N.R.C. 499, 505 (1988), support this proposition. Petitioner is in error. Both of those cases considered the adequacy of an applicant's emergency evacuation plan, as determined through pre-licensing emergency preparedness exercises, and noted that a "fundamental flaw" disclosed through such exercises would justify reopening the licensing hearing. The cases have no applicability to allegations that individual pieces of equipment are defective.[4]

In this case, petitioner's allegation that a specific piece of equipment has failed to function properly is typical of the kinds of contentions raised by persons seeking to intervene in ongoing proceedings. See 10 C.F.R. 2.714(b). The Commission acted well within its discretion in rejecting a request for late intervention to litigate the adequacy of a particular piece of allegedly defective equipment—a piece

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gon, 329 U.S. 143, 155 (1946) ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented.").

[4] As *Long Island Lighting Co.* (*Shoreham Nuclear Power Station, Unit 1*), ALAB-903, 28 N.R.C. 499, 505 (1988) points out, to justify reopening the challenging party must demonstrate "a failure of an essential element of the plan," and must show that the defect "can only be remedied by a significant review of the plan." Indeed, when litigating a "fundamental flaw" in an emergency plan, an intervenor is limited to litigating only those items which are identified as a part of the "fundamental flaw." *Id.* at 504. Even if we assume that these cases are relevant to the quite different question of alleged defects in equipment, petitioner has not demonstrated that a significant review of the plant specifications is necessary, and attempts to litigate issues far beyond the alleged defects in the check valves. In any event, petitioner suggests no reason why the alleged defect could not be remedied by simply replacing the equipment.

of equipment that is no more significant than many of the myriads of other pieces of equipment at the plant.

The refusal to reopen does not, of course, mean that the Commission is ignoring a safety issue. The NRC technical staff has the authority and the responsibility to assure that reactor safety is not impaired by faulty equipment, regardless of whether the matter is being litigated before a Licensing Board. If the improper functioning of reactor equipment poses a safety hazard, the Commission may require TU Electric to repair or replace the equipment. But nothing in the Atomic Energy Act or Commission regulations calls for reopening a closed adjudicatory hearing merely on the basis of a claim of an equipment malfunction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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